

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 4730**

Heard in Calgary, February 12, 2020

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

-And-

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal on behalf of Conductor L. Tengs of Edmonton, AB, concerning the assessment of discharge for “walking on the top of hopper cars and crossing to the adjacent cars (without fall protection per GOI 8.4.10) and improperly crossing over between coupled equipment as required per GOI 8.12.9 while servicing Pinnacle at Entwistle, during your tour duty on June 5, 2019. All time held out of service to be a suspension without pay or benefits”.

**JOINT STATEMENT OF ISSUE:**

On June 5, 2019, the grievor was ordered as the Conductor on train RC75651-03. The grievor relieved the inbound crew of C75651-03 and was required to complete the servicing of a customer (Pinnacle) at Entwistle on the Edson subdivision.

While at Pinnacle, the grievor was recorded on video cameras on the customer's property, walking on top of hopper cars and crossing over between coupled equipment. Pinnacle reported this footage to CN. The Grievor attended a formal investigation on June 10 and a supplemental investigation on June 17, 2019, resulting in his discharge on June 20, 2019.

The Union contends that the employer-employee relationship of trust has not been irreparably damaged, and the facts of the case do not justify the ultimate penalty of discharge. The discipline assessed was excessive and should be expunged, or in any case reduced, and the grievor's record made whole.

The Company contends that the Grievor put himself in incredible danger and was putting the Company's legitimate business interests at risk when representing the Company to its customers. The Company disagrees with the Union's contentions and has denied the request.

**FOR THE UNION:**  
**(SGD.) R. Donegan**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) D. Houle** (for) **D. Klein**  
Senior VP Human Resources

There appeared on behalf of the Company:

- V. Paquet – Manager, Labour Relations, Toronto
- D. Houle – Human Resources Business Partner, Edmonton
- S. Blackmore – Senior Manager, Labour Relations, Edmonton

J. Ellis	– Senior Manager WOC, Edmonton
F. Daignault	– Manager, Labour Relations, Montreal
D. Radford	– General Manager, Operations, Montreal
S. P. Paquette	– Director, Dispute Resolution & Labour Standards, Montreal

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, Saskatoon
L. Tengs	– Grievor, Edmonton

### **AWARD OF THE ARBITRATOR**

1. Luke Tengs, the Grievor, began work with the Company in October of 2017. At the time of the incident in question on June 5, 2019, he was 23 years old and served as a conductor assigned to the spareboard in the Edmonton Terminal. His record, at that time, reflected a 30-day suspension for a Cardinal Rule violation for “... *going into a foreman’s limits while working ... on April 8, 2019*”.

2. On June 4, 2019 – having returned from his suspension 27 days earlier - the Grievor was called to relieve train C75651 03, located at Entwistle and complete the servicing of one of CN's customers (Pinnacle).

3. Following his shift, Pinnacle advised the Company that, on review of their security footage, they noted the Grievor walking along the top of covered hopper rail cars and crossing over between coupled equipment. A copy of the footage was provided to the Company. I have viewed it. It shows the Grievor walking along the top of hopper cars as he moves toward the head end of the train.

4. Two investigative interviews followed. During the first one, on June 10, 2019 (Union Tab 4), the Union requested that voice recordings (tapes) between the Grievor and the RTC Chief be provided.

5. He alleged that his walking on top of the rail cars was in response to what he considered “*pressure*” from the RTC Chief who had asked him to “*run*”. He states at

Q.9:

*Q.9. Mr. Tengs, can you explain why you would walk on top of the cars instead of on the ground, at Pinnacle?*

*A.9. When we rescued the train from the previous crew, they had already pulled into Enwhistle siding, so an amount of time had elapsed during the trade off. During this process and after while spotting, a number of trains began to build up on the main line and we were contacted numerous times by the RTC and also the RTC chief asking how long the process would take and pressuring us to hurry. **More than once the RTC chief requested that I would run or jog to expedite the process.** Feeling pressured after noticing uneven ballasts conditions, plenty of road construction and feeling too slow, I climbed up on the car to be faster, safer and to get to the headend. (Emphasis added)*

6. That said, in Q.10, he provides the following answer:

*Q.10. Mr. Tengs, did anyone tell you to get on top of a hopper car that was more than 6 feet from the ground with no hand held, also to step across one car to another?*

*A.10. No.*

7. At the initial interview, in response to a question from the Union, The Grievor says he would not have walked atop the cars had it not been for the pressure put on him by the RTC Chief. He says:

*Q.19. Mr. Tengs, if you had not felt the pressure you described in Q 9 by the CN supervisor who specifically instructed you to break GOI 8 4.1.1, would you have taken it upon yourself to walk on top of the cars?*

*A.19. No.*

8. On June 17, 2019 (Union Tab 5), in a supplemental interview consequent upon the production of the tapes, the following exchange took place:

*Q.6. Mr. Tengs, you have stated in your investigation that you conducted on June 9<sup>th</sup>, 2019, that the crew supervisor told you to run/jog/hurry.*

*In the new evidence provided, the crew supervisor is heard not telling you to run or do anything that was unsafe.*

*Can you explain why you said in your previous investigation, you felt hurried and thought it was the quickest and safest way to get to the head end, when you were walking on top of the hopper car?*

*A.6. In regards to the tapes, from 45 seconds to 52 seconds there is a portion of audio that has been noticeably removed.*

*The last word you hear is "can you tell the conductor...then a gap with no sound...followed by some laughter from the chief and the locomotive engineer answering, "I can run it by him", during the sound gap, the chief said "can you tell the conductor to run up."*

9. Following that investigation, the Grievor was discharged on June 20, 2019.

10. The Union grieves the discharge on the basis that the discipline was excessive and unwarranted and that, in any event, it should be reduced and the Grievor reinstated and made whole.

11. The Company asserts the Grievor, instead of proceeding by ground to the head end of his train, chose to climb to the top of a hopper car - over 15 feet from the base of the rail - and proceed over numerous cars to the head end of the train. It argues that this behavior was not an error in judgement, or simply inadvertence which might qualify as mere negligence; rather, it constituted reckless behaviour in plain disregard of safety rules.

12. The distinction between recklessness and negligence is described by Arbitrator Hope in **AH 249** (at p. 11):

*... A deliberate breach of the rule might very well be cause for dismissal. Obviously there can be a range of conduct that constitutes a breach of the rule ranging from recklessness to inadvertence. I am of the view that an important factor in reviewing a dismissal imposed in response to a breach of the rule is the nature of the breach. **As stated, the essential question in an arbitral review of a dismissal for breach of a safety rule is the extent to which an employee who has breached the rule can be relied on to work safely in the future.** Obviously an employee who has been reckless in his disregard of the rule is not a likely candidate for rehabilitation of the relationship. The same inference does not necessarily arise with respect to employees who have been negligent. The law makes a distinction between recklessness and negligence. Both involve a departure from an acceptable standard of care, but recklessness involves conduct that the perpetrator knows or ought to know involves an immediate risk. Negligence, on the other hand encompasses a spectrum from carelessness to mere inadvertence. (Emphasis added)*

[...]

*... But arbitral jurisprudence does recognize that the particular facts in a breach of a safety rule can mitigate the act in an application of a rationale similar to that which distinguishes between (sic) and negligence. That is, the extent to which the facts imply that particular grievors knew or ought to have known that their actions involved risk to the lives or safety of persons or damage to property will determine the gravity with which their misconduct is to be assessed in terms of their reliability in the future.*

13. Arbitrator Hope proposed, in determining if recklessness existed, that the logical first step would be to determine whether there was a deliberate assumption of risk to the lives or safety of persons or damage to property:

*In that context, care must be taken to understand that a breach of the rule is not invested with the strictures of presumed recklessness simply because it may have involved carelessness or that the consequences were, in retrospect, foreseeable. I make that observation in response to the Railway's observation that the law makes a presumption of fact that persons will be taken to have intended the reasonable and probable consequences of their acts. **That presumption will not operate to make a careless act a reckless one unless there is evidence of deliberate or conscious***

***assumption of risk in the sense, at the least, of a marked departure from an accepted standard.*** (Emphasis added)

14. The Company's position is that the quantum of discipline should take into consideration the Grievor's lack of compliance with safety rules; the recklessness of the Grievor's choice; and, the seriousness of his conduct considering the risk involved.

15. It asserts that the Grievor's deliberate choice to climb to the top of the hopper cars and walk toward the front of the train without appropriate protection, and without advising the Engineer of his intention to do so, posed an unacceptable risk to his own safety particularly having regard to the time of night and the relative isolation of the two crew members.

16. The Company maintains, relying on the comments made by Arbitrator Hope in **AH 249**, that considering the nature of the breach and its implications, as well as his previous record, the Grievor cannot be relied upon to maintain a proper standard of safety in the future.

17. The Union does not deny the conduct of the Grievor as described herein and captured on video. Rather it argues that, based on the jurisprudence which it provided and the mitigating circumstances it outlined, the penalty of dismissal is too severe in the circumstances.

18. Outside of the debate on whether or not the Grievor was told by the RTC Chief to "*run or not*" there is no dispute regarding the facts.

19. The Union suggests, as pointed out in the Grievor's allegations, that a contributing factor for his conduct was the pressure put upon him by the RTC Chief who told him to "run" to speed things up.

20. In support, the Union includes a statement from the Locomotive Engineer, Craig Suchan of June 26, 2019, (Union Tab 13) wherein he states:

*In the process of making our moves the RTC inquired as to how long it would take. Mr. Tengs told him about 30 minutes. During the process of spotting the Chief came on and asked how long it would be. We told her we were on the final shove and after that all that was left was to secure the cars and walk up to the head end. **She said something in regards to hurrying; she then mentioned you can run.** I replied not a good idea, to which she said, "I know, do the best you can in a timely fashion."*

21. It is notable that Mr. Suchan's statement does not corroborate the Grievor's assertion that the RTC Chief requested, "... More than once [that] that I would run or jog to expedite the process".

22. The onus falls to the Union to satisfy me, on balance that the alleged statements were made to the Grievor. Although the tape is often garbled, the RTC Chief cannot be heard to say to the Grievor that he should "run".

23. However, even if I were to accept that the RTC Chief made the statement it would, at best, only be relevant as a mitigating factor with respect to the Grievor's state of mind. It is not determinative with respect to the Grievor's culpability.

24. Further, irrespective of whether the statement was made or not, there is no suggestion that anyone told the Grievor that he should do so on the top of the hopper cars. In fact, the Grievor specifically admits that fact (Q.10).

25. His explanation that he would not have gone to the top of the cars if he had been pressured by the RTC Chief's comments (Q. 19), is not internally consistent in that he contradicts the same with his statement that he chose to climb to the top of the hopper cars because he was: ... *Feeling pressured after noticing uneven ballast conditions, plenty of road construction and feeling too slow, I climbed up on the car to be faster, safer and to get to the head end.*" (Q.9)

## **Conclusion**

26. There is no dispute that the Grievor's conduct was culpable and deserving of discipline. The only issue is the extent of the same.

27. In his initial interview, the Grievor provided the following explanation for his conduct:

*Q.20. Do you have anything further to add to this employee statement?*

*A.20. Yes. I understand the actions I took walking on top of equipment while feeling pressured by the company supervisor was unsafe and not the appropriate way to deal with the issues at hand. I will do my best in the future to deal with these kinds of situations in a more responsible manner.*

*Moreover, I have had time to think about CN's role as a customer centric organization and my own position as a front line employee representing the company to our customers on a day to day basis. I realized my actions were not a positive experience for CN's customer and I will strive to consider how my actions might impact them and their trust in CN as I perform my duties.*



28. The Union offers the following list of mitigating circumstances to be considered in assessing the appropriateness of the discipline levied in this case:

- *The Grievor's actions were an isolated lapse of judgment and do not elicit a pattern of similar or knowingly dangerous behaviour;*
- *....the ground around the Grievor was uneven and littered with the remnants of nearby construction. The Grievor therefore reasonably believed that it was safer to walk along the hopper car;*
- *The Grievor felt pressure from his superiors to complete the job quickly;*
- *The Grievor's actions were not particularly dangerous when one considers the entirety of the circumstances...this includes hopper cars designed to be walked on and car tops have wide surfaces with walkways. The car was stationary and the Grievor had full control over the car's movement;*
- *The video evidence shows the Grievor walking slowly along the car tops with his head down to avoid tripping or falling;*
- *The Grievor's actions did not endanger the lives of any other railway employee, customer or member of the public;*
- *The safety violation is not a Cardinal rule; and*
- *The Grievor has taken responsibility for his actions and was forthright throughout the investigation into this matter.*

29. Having considered the evidence, and adopting the reasoning of Arbitrator Hope in **AH 249**, I conclude that the Grievor consciously chose to climb to the top of the hopper cars and walk toward the head end of the train thereby deliberately assuming the risk involved while knowing that it represented a departure from accepted safety rules and standards. In short, he was reckless.

30. Although the Union argues that the Grievor has taken responsibility for his actions, I do not share that view. His explanations were predicated on the fact that he

was being pressured by the RTC Chief and thereby attempted to deflect his own responsibility; this, to the point where he insists that he would not have walked on the hopper cars without the alleged pressure from the RTC chief. Oddly, he then allows that there were other considerations like the condition of the ballast and presence of construction.

31. He initially stated that the tape of their communications would corroborate his version of events. And, when those portions which were to have contained the alleged comments by the Chief were missing, he inferred that they were purposely erased by the Company.

32. Nowhere did he accept outright responsibility or express regret or remorse for his conduct. Rather he made repeated attempts to pass off the blame to the RTC Chief and otherwise excuse his behaviour. His puzzlingly qualified statement (Q.20) at the conclusion of his initial interview, falls far below the mark on either point.

33. Given the same, I can understand the Company's concern – particularly having regard to his record of a previous serious safety breach just months earlier – regarding the extent to which the Grievor can be relied on to work safely in the future.

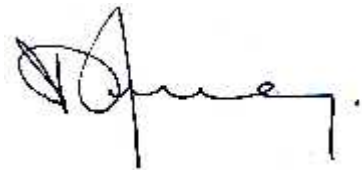
34. While the misconduct itself would ordinarily warrant a only a reasonable suspension, the Grievor's: recklessness; his subsequent attempts to deflect responsibility and blame; his previous record; his short service; the absence of remorse; and, the concern regarding the extent to which he can be relied on to work safely in the

future, warrants – at the least - a significant suspension to bring home to the Grievor the importance of adhering to safety standards and accepting responsibility for your conduct in order to improve future performance.

35. Having considered the nature of the original breach and the aspects outlined above, I believe that an appropriate suspension would address the Company's concerns regarding the Grievor's conduct while providing him one more chance to prove that he can be a productive employee capable of conforming to the safety requirements necessary in a safety sensitive industry.

36. Accordingly, the grievance is allowed in part. The dismissal shall be set aside. The Grievor shall be reinstated, effective the date hereof, without compensation and without loss of seniority.

37. I shall retain jurisdiction with respect to the interpretation, application and implementation of this award

A handwritten signature in black ink, appearing to read "R. Hornung", is written above a solid horizontal line.

**RICHARD I. HORNUNG, Q.C.  
ARBITRATOR**

April 15, 2020